every ticket he sold and he was not entitled to any winning ticket commission.

Now I do not think that I have missed out any issue or contention raised by counsel. I need only to confirm that there must be a verdict for the first defendant and I accordingly do so. The plaintiff's action is dismissed with costs. One final word. The maxim applicable in the present case is not 'finders keepers' but rather 'loser weepers'.

Claim dismissed.

Solicitors: *Karpal Singh & Co; Zainur & Maydien.*

Reported by *Prof Ahmad Ibrahim*

Ting Jie Hoo v Lian Soon Hing Shipping Co

HIGH COURT (SIBU) — SUIT NO 46 OF 1984
CHONG SIEW FAI J
30 MARCH 1989

Tort — Negligence — Negligence occurring in course of employment — Duty of care owed to employee — Standard of care — Due care — Defence of inevitable accident — Volenti non fit injuria

Civil Procedure — Pleadings — Defence — Denial of allegations in statement of claim — Deviation of evidence from pleadings — Contributory negligence — Must be pleaded

Damages (Personal Injury or Death) — Pain and suffering — Loss of amenities — Loss of earnings — Burden of proof on plaintiff — Duty to mitigate loss

The plaintiff was employed by the defendant as a labourer. On 7 September 1982, the plaintiff was involved in an accident while handling the wire-rope of a crane mounted on a barge on a river. The plaintiff claimed that when the crane's engine was started, the boom suddenly swayed towards him and struck him on his legs. He suffered (a) a punctured wound on the lower left thigh; (b) a deep lacerated wound over the right leg; (c) fracture of the lower right tibia; (d) fracture of the fourth and fifth metatarsal bone of the left foot; and (e) fracture of the medial malleolus on the left foot. There was a 2cm shortening of the right leg, the right leg was slightly bent and the last two toes of the left foot could not be straightened. The plaintiff claimed damages for pain, suffering and loss of earnings. The defendant pleaded the defence of inevitable accident and, alternatively, volenti non fit injuria.

Held, allowing the plaintiff's claim:

(1) In their defence, the defendants pleaded that the plaintiff meddled with the crane contrary to instructions. However, the defence witnesses testified that the plaintiff did nothing but place his hands on the boom. This deviation of evidence was of material significance where the evidence of the parties were in sharp contrast. In addition, the defendants had not specifically denied, in their pleadings, the plaintiff's allegation that he was handling the wire-rope when the engine was started. In consequence, the court accepted the plaintiff's testimony on this point.

(2) However, the plaintiff failed to prove on a balance of probabilities that the engine was started, causing the boom to sway. The court, however, accepted that the boom was allowed to rest on an empty oil drum when not in use and found that there was no evidence to show that the boom was secured in any way when at rest.

(3) At common law, the duty of an employer towards his employees is to take reasonable care for their safety in all the circumstances of the case so as not to expose them to an unnecessary risk. The standard of care which the law demands is the care which an ordinary prudent employer would take. In each case the nature of the employment must be considered, and in measuring due care it is necessary to balance the risk against the measures necessary to eliminate the risk. Where the employer is a company, it is liable for the negligence of its servants towards a fellow servant where the negligence occurs in the course of his employment.

(4) Given that the Rejang is a busy river, the risk that waves brought about by passing motor vessels might cause the boom of the crane to fall was reasonably foreseeable. There had been a breach on the part of the defendant as employer to exercise reasonable care for the safety of the plaintiff as its employee which had materially contributed to the plaintiff's injuries.

(5) The burden of proof of inevitable accident was on the defendants and they had failed to show that the fall of the boom caused by the waves was inevitable.

(6) As for the plea of volenti, the defendants must show that the plaintiff fully appreciated the dangerous nature of the work and risks involved and acted as a volunteer in the strictest sense. At the time of the accident, the plaintiff had been in the defendants employ for only 12 days. There was no evidence that he understood and appreciated the risk and danger of his work nor that he volunteered in carrying out the work.

(7) The defence asked the court to consider the question of contributory negligence, but as this had not been pleaded it was not available to the defendants.

(8) There would be an award of $20,000 for pain and suffering.

(9) The plaintiff had failed to show that he was unable to work till the date of the trial. He was in a position to resume work between January and April 1986. There is a duty on the part of the plaintiff to mitigate loss and as it was not possible to state with certainty when the plaintiff could resume work, a middle course would be adopted and August 1985 be taken as the time when the plaintiff could begin work. Accordingly, loss of earnings would be calculated from the date of the accident to 6 August 1985 and a sum of $14,000 be awarded.

(10) As the plaintiff could resume work, this was not an appropriate case to award loss of future earnings. However, the plaintiff had suffered a loss of earning capacity and was entitled to an award of general damages for disability suffered. The plaintiff was 37 years old in 1985 and taking 55 as the retirement age and allowing 1/3 from this for contingencies of life, the years of purchase would be fixed at 12. A figure of $21,500 was therefore awarded as loss of earning capacity. But there would be no interest on this award.

Cases referred to

1 *Wilsons & Clyde Coal Co Ltd* v *English* [1937] 3 All ER 628 (follid)
2 *Smith* v *Baker & Sons* [1891] AC 325 (follid)
3 *Smith* v *Austin Lifts Ltd & Ors* [1959] 1 All ER 81 (follid)
4 *Morris* v *West Hartlepool Steam Navigation Co* [1956] AC 552 (follid)
5 *Mat Jusoh bin Daud* v *Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 (follid)
6 *Watt* v *Hertfordshire County Council* [1954] 2 All ER 368 (follid)
7 *Staveley Iron & Chemical Co Ltd* v *Jones* [1956] AC 627 (follid)
8 *Bonnington Castings Ltd* v *Wardlaw* [1956] 1 All ER 615 (follid)
9 *The 'Merchant Prince'* [1892] P 179 (follid)
10 *Fookes* v *Slaytor* [1979] 1 All ER 137 (follid)
11 *Multar* v *Lim Kim Chet & Anor* [1982] 1 MLJ 184 (follid)
12 *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217 (follid)
13 *Joyce* v *Yeomans* [1981] 2 All ER 21 (follid)
14 *Jefford* v *Gee* [1970] 1 All ER 1202 (follid)
15 *Tan Lian Heng* v *Kilang Papan Aman Sdn Bhd & Anor* [1987] 2 MLJ 630 (follid)

Wong Mee Ing (*Miss*) for the plaintiff.
Belinda Hii (*Miss*) for the defendants.

Cur Adv Vult

Chong Siew Fai J: This is a claim by the plaintiff for damages for personal injuries and consequential loss arising out of an accident on board a barge anchored by a wharf along the Rejang River near Sibu on 7 September 1982 at about 6.45am. The defendant is a shipping company called the Lian Soon Hin Shipping Company. The following facts were agreed:

(a) At the time of the incident, the plaintiff was in the employ of the defendant company as a labourer and had been so employed for only 12 days and was new in his job.
(b) The incident took place on board the barge WTK No 3 on 7 September 1982 at about 6.45am.
(c) At the material time, the barge was anchored at a wharf along the Rejang River, Sibu.

The parties also agreed to the following in the event of liability being established:

(1) Cost of medical report $40.
(2) Transport charges $150.
(3) From the amount of general damages awarded to the plaintiff, a sum of $5,670 is to be deducted.

At the trial the defendant abandoned para 6 of the defence alleging the plaintiff being barred from claiming under the common law by reason of the provisions in the Workmen's Compensation Act 1952 (Rev 1982).

Before proceeding further, I would dispose of one matter, and that is this. For the closing speeches of the case, written submissions were used by counsel for both parties. Their efforts are appreciated. However, two matters need to be pointed out in the context of the present case. First, if written submissions are intended to be used by both sides, there ought, for the purpose of completeness and quality of the arguments advanced, to be exchanges of written submissions with reasonable intervals of time between the exchanges for both sides to answer to points or contentions raised. Secondly, the practice of relating witnesses' testimonies and punctuating them with quotation marks when such testimonies are not the authenticated versions from the notes of proceedings of the trial court is extremely undesirable and must cease. They tend to mislead since the wordings are almost always at variance from the notes of evidence recorded by the trial judge. If, for any reason, quoting witnesses' evidence is considered necessary for the purpose of submissions, a certified copy of the notes of evidence as recorded by the court ought to be applied for. I wish to make clear that in the course of deliberating this case, I based on the evidence as recorded by me at the trial and gave no regard to the 'quoted' passages, as such, appearing in the written submissions of counsel purporting to be evidence from witnesses except where they were consistent with the evidence recorded by me.

The evidence of the plaintiff was that on 7 September 1982 at about 7am he was asked by the 'Chinchew', Sia Chew Hai (DW1), to change the steel wire-rope of the crane on board the barge. In the process he had to pull out the old wire-rope from a pulley. As he had difficulty in pulling the wire-rope, a fellow employee whom he knew by the name of Unpan who was employed by the defendant company as a crane driver started the engine. It was common ground that at that time, the crane was with the end part of its boom resting on an empty oil drum. The drum was about 3 ft high. According to DW1, Sia Chew Hai, who, at the material time was also in the employ of the defendant company as chinchew cum juragan of the barge, it was the normal practice that at the time of changing the wire-rope of the crane, the end of the boom of the crane would be placed on top of an oil drum.

The plaintiff said when the engine was started, and he was still holding the wire-rope, the boom of the crane suddenly swayed towards him. He was struck and the boom landed on his legs. His legs were seriously injured and he was sent to the Lau King Howe Hospital.

In his evidence, DW1, Sia Chew Hai, also said that some repair to the crane was needed and the wire-rope had to be replaced. Apart from himself, there were three other employees on the barge, ie the crane driver Unpan, one Sia Hong and the plaintiff, all in the employ of the defendant company. It was also in evidence by DW1 that the boom of the crane was rested on top of the empty oil drum. This, he said, was the usual practice when the wire-rope needed to be changed. He said the work of repairing the crane and

changing the wire-rope were to be done by one Teck San Engineering Works. According to DW1, the crane fell because of the movements of the barge caused by the waves created by the passing boats and not because of the engine of the crane being started and the plaintiff pulling the wire-rope.

In his evidence, the plaintiff said he came to be employed by the defendant company through Ting Lik Chung who asked him to take over the job of DW1 Sia Chew Hai who was the 'chinchew' of the barge and, at the material time, was injured and hospitalized. This was substantiated by the evidence of DW1 who said he was ill and that the date of the incident, ie 7 September, 1982 was the first day that he worked with the plaintiff. He had never worked with the plaintiff previously though he met the plaintiff on 5 September 1982 when he told the plaintiff that his job was to do cooking, sweeping and cleaning in the tugboat. As to this part of the evidence about DW1 asking the plaintiff to do works in the tugboat, I find the evidence does not exclude the works of the plaintiff on the barge. In his own evidence, DW1 also said the plaintiff was employed to cook and do general cleaning on the barge. Moreover, to my mind, considering that there were only four persons working, it is highly improbable that the work of the plaintiff would be confined to the tugboat. DW3 at the material time was running and in charge of the defendant company. According to him, his father agreed to give the plaintiff a job but he gave the plaintiff the job which included working on the barge as well as in the tugboat.

As to the plaintiff's evidence that DW1 Sia Cheng Hai asked him to pull the wire-rope, this was denied by DW1. There is sharp conflict of evidence. What DW1 said, which the plaintiff denied, was that that morning, before the accident, he told the plaintiff not to stand too close to the crane. He said at the time the plaintiff was standing beside the crane. However, he did not say how long it was before the accident that he told the plaintiff this. DW1 also denied that the plaintiff was pulling the wire-rope at the material time. He said the plaintiff just stood there doing nothing except placing his hands on the boom of the crane. And DW2, Lipan anak Jalani, also said to the effect that the plaintiff did nothing other than placing his hands on the boom of the crane. It will be noted that this last part of DW1's evidence and DW2's evidence just mentioned were not quite in consonance with the defendant's defence. In paras 2 and 5 of the defence and in item (d) of the particulars to para 4 thereof, the defendant pleaded that the plaintiff attempted to meddle with the crane contrary to the juragan's instruction. This plea is more than 'just stood there doing nothing except placing his hands on the boom of the crane'. Furthermore, in the particulars to para 3 of the defence, the plea was that the plaintiff was on the bow of the barge repairing the crane's steel wire-rope though the word 'allegedly' was used. It was not pleaded in the particulars that the plaintiff stood there doing nothing apart from placing his hand on the boom of the crane, as one would reasonably have expected if that were the case of the defendant.

Considering the pleadings in the broad sense, I also find that the defendant had not specifically denied the plain facts averred in para 3 of the statement of claim. In the said para 3, the plaintiff specifically alleged, inter alia, his attendance to the steel wire-rope, that another person started the crane engine thereby causing the boom of the crane to fall from the oil drum. Paragraph 3 of the defence makes no specific denial of the above alleged facts. It merely contended 'the matters referred to in para 3 of the statement of claim were not caused by the negligence or default on the part of the defendant their servant or agent', and then went on to plead the defence of inevitable accident and the exercise of reasonable care and skill. Although there is, in para 4 of the defence, a general denial of the allegations contained in para 3 of the statement of claim, the defendant, in item (d) of the particulars to the said para 4 and in para 5 of the defence, itself averred that the plaintiff attempted to 'operate and/or meddle' and 'was meddling' with the crane.

The deviation of evidence adduced by a party from its own pleadings in the manner as stated above is of material significance in a situation where, as in the instant case, the evidence of the parties is in sharp conflict.

Apart from the above observations on the pleadings, I have also considered the evidence of the witnesses and seen them giving evidence. I am inclined to believe the testimony of the plaintiff in this respect, and I find as a fact that at the material time in the morning of 7 September 1982, the plaintiff did the act of pulling the old wire-rope through the pulley of the crane and that in the course of so doing, he was injured when the boom of the crane fell from the top of the drum.

As to the allegation of the defendant that the plaintiff, in operating and/or meddling with the crane, was in defiance or disregard of the express instruction of the juragan, I also find the contention fails. At best, the evidence of DW1 about the instruction was not to stand too close to the crane and that of DW2 was not to go near to the crane. These are not the same as instructing not to operate or meddle as alleged in the defence.

As regards the plaintiff's duties in his employment with the defendant company, according to the plaintiff, there was no specific duty assigned to him. He was to perform overall general duties in the barge including loading and unloading of logs, sweeping, cleaning and cooking. In his evidence, DW3 said he gave the plaintiff the job of working in the barge as 'a general crew' though he told the plaintiff the nature of his work was cooking, tidying and tying ropes.

On the evidence, I accept that the plaintiff was employed to perform general duties in the barge and the tugboat and that the act of pulling out the old wire-rope from the pulley came within the scope of the plaintiff's employment with the defendant or was, at least, work which the plaintiff might reasonably be expected to perform in the ordinary course of his employment with the defendant. With this finding and for the reasons above, I am unable to accept the contention of the defence that DW1's evidence, even if true, of warning the plaintiff not to stand too close to the crane constituted sufficient warning to the plaintiff in the circumstances.

The next point to consider is what caused the boom of the crane to fall. The case and the evidence of the plaintiff was that the fall was caused by the start of the engine by another of the defendant's employees whom he knew as 'Unpan'. This was denied by DW1, Sia Chew Hai, who said the engine was not started, and DW2, Lipan, the crane driver, said he did not start the engine. The case of the defence is that the boom of the crane fell because of waves caused by passing boats in the river.

I would mention here that both the plaintiff and DW1 had, in their evidence, mentioned 'Unpan' as the crane driver. I am convinced that 'Unpan' referred to by the plaintiff and DW1 was DW2, Lipan.

On the evidence, I am unable to hold that the burden which is on the plaintiff of proving, on a balance of probabilities, that the engine of the crane had been started and that it was the running of the engine that caused the boom of the crane to fall, has been discharged. I shall proceed to consider the case on the basis of the defence contention that the boom of the crane fell because of waves in the river. On such premises, I would, however, point out an inconsistency in the defence evidence in that whereas DW1 said that the waves were caused by passing boats, DW2's evidence was that the waves resulting in the fall of the boom of the crane was caused by one express boat.

At common law, the duty of an employer towards his employees is to take reasonable care for their safety in all the circumstances of the case so as not to expose them to an unnecessary risk. *Wilsons & Clyde Coal Co Ltd* v *English*[1] at p 644: *Smith* v *Baker & Sons*[2] at p 362. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances: *Smith* v *Austin Lifts*[3] at p 87. In *Morris* v *West Hartlepool Steam Navigation Co*[4] at p 574, Lord Reid stated that it was the duty of an employer 'in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand the difficulty and expense and any other disadvantage of taking the precaution'. In *Mat Jusoh bin Daud* v *Syarikat Jaya Seberang Takir Sdn Bhd*[5] at p 75, the duty of the employer has been described as not to subject the persons employed to any risk which the employer can reasonably foresee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved. In each case the nature of the employment must be considered and in measuring due care it is necessary to balance the risk against the measures necessary to eliminate the risk. *Watt* v *Hertfordshire County Council*[6] at p 371.

In the case of an employer being a company, it is liable for the negligence of its servant towards a fellow servant where the negligence occurs in the course of his employment: *Staveley Iron & Chemical Co Ltd* v *Jones*[7] at p 639. Where an employee sues his employer for damages on negligence for breach of duty as an employer towards him, the onus is on him (the employee) to establish both the breach of duty and the fact that the breach caused or materially contributed to his injuries. *Bonnington Castings Ltd* v *Wardlaw*[8] at p 621.

In the instant case, DW1 said that each time the wire-rope of the crane was to be changed, the boom was placed on top of the oil drum. No clear evidence was adduced as to what exactly was done each time. With respect, such evidence of what the defendant used to do when a change of wire-rope was needed, without more, is insufficient to establish the existence of a regular or general practice to take no precaution in the trade. There is no evidence that the boom, which was about 50 ft long and heavy, was in any way secured to the drum. It was merely placed on top of the drum in the afternoon prior to the day of the accident (ie the afternoon of 6 September 1982). The drum was an empty one and this was known to DW1. Another fact of significance is that the barge was empty, ie not loaded with cargo. This last stated fact meant that the barge would be more readily susceptible to disturbances of surface water in the river, eg waves. The Rejang is a wide busy river. That was also the position in the morning of the accident as shown in the evidence of DW2 who said: 'That morning there were boats moving up and down the river. There were waves.' In the circumstances, the risk, in my view, is reasonably foreseeable that the waves brought about by passing motor vessels might cause the boom of the crane to fall particularly when the barge was unloaded with goods, thereby more readily rendering it to being tossed about. In my opinion, measures of some sort ought to have been taken to secure the boom to the drum. There had, in my view, been a breach on the part of the defendant as employer to exercise reasonable care for the safety of the plaintiff as its employee and that the breach had materially contributed to, if not solely caused, the injuries of the plaintiff.

The defendant pleaded the defence of inevitable accident and also or, alternatively, that the plaintiff acted on his own volition, in other words, the defence of volenti non fit injuria.

The burden of proof of inevitable accident is on the defendant in the instant case. On the basis of accepting the defence case respecting the cause of the accident, the defendant still has to show that the result of that cause was inevitable: *The 'Merchant Prince'*.[9] Or, the defendant must show that the occurrence of the accident was consistent with the exercise on its part of reasonable care and skill and that it in fact exercised reasonable care and skill. In the instant case, the boom of the crane rested on the top of an empty drum without in any way being secured or fastened, and the waves generating from passing motor vessels were reasonably foreseeable. The defendant failed to show that the fall of the boom caused by the waves was inevitable. DW1's evidence of what he did, even if accepted as the truth, was no more than telling the plaintiff not to stand close to the crane. I have found that pulling of the old wire-rope through the pulley of the crane, as the plaintiff did, was within the scope of his employment. In the circumstances, the warning as meted out by DW1 does not by itself amount to exercise of reasonable care and skill to prevent the accident. The totality of evidence falls far short of establishing a case of inevitable accident.

As to the plea that the plaintiff acted on his own volition (in effect, defence of volenti non fit injuria), it must be shown not only that the plaintiff fully understood and appreciated the risk and danger of the work but also that in carrying out the work he had acted as a volunteer in the strictest sense:16 *Halsbury's Laws of England* (4th Ed) para 719. By the time of the accident the plaintiff had been in the employ of the defendant for only 12 days. I have held earlier that what the plaintiff did (pulling the old wire-rope through the pulley of the crane) was within the scope of his employment. There is no evidence that he understood and appreciated the risk and danger of his work nor that he volunteered in carrying out the work which I held he did. The defence, therefore, must fail.

In his submission, counsel for the defendant urged me to consider the question of contributory negligence on the part of the plaintiff. With respect, contributory negligence is not available to the defendant, it not having been pleaded in the defence. I am not saying there is such negligence on the part of the plaintiff, but even if there were, I would not be entitled to so hold. *Fookes* v *Slaytor*.[10]

After considering the evidence and the submissions by counsel, I find that the plaintiff has succeeded in proving that the accident was caused by the negligence of the defendant. More particularly, I find that items (a), (c) and (d) of the 'particulars of negligence' in para 4 of the statement of claim have been proved. In relation to item (b) thereof, it is my finding that on the evidence the boom of the crane at the time of the accident had not in any way been secured or fastened to the empty oil drum. I hold that the defendant is solely liable to the plaintiff in this action. I shall now consider the question of damages.

Pain and suffering and loss of amenities

The evidence of PW1, Dr Thambi Dorai, shows that the plaintiff was admitted into the Lau King Howe Hospital on the morning of 7 September 1982 and was found to have suffered the following injuries:

(a) a punctured wound over the lower 1/3 of the left thigh and multiple lacerated wounds over the lower leg and dorsum of the left foot;
(b) a deep lacerated wound 6 cm x 4 cm x 2 cm over the lower 1/3 of the right leg;
(c) fracture of the lower 1/3 of the right tibia and tear of the extensor tendons over the right leg;
(d) fracture of the fourth and fifth metatarsal bone of the left foot;
(e) fracture of the medial malleolus on the left foot.

The plaintiff was hospitalized from 7 September 1982 to 3 November 1982. During the hospitalization, the fracture was reduced, the tibia bone was fitted with screw, the tendons and the wounds were cleaned and sutured. His right leg was in plaster till 16 December 1982 and he had to use crutches till June 1983. After leaving the hospital, the plaintiff returned to the hospital for outpatient treatments on over 20 occasions. In between these, he was again hospitalized between 8 November 1983 and 16 November 1983 for removal of the screw.

Dr Dorai had occasion to examine the plaintiff in the course of this trial and found that the plaintiff had approximately 2 cm shortening of his right leg and the lower 1/3 of the right leg was slightly bent; the last two toes of the left foot could not be straightened and there was a scar on the dorsum of the left foot. The plaintiff also suffered restrictions in movement in that he had diminution in the upwards and downwards movements of his right foot. Dorsiflexion and planterflexion of the right foot were also affected though the approximate extent or degree of restriction was not given. The plaintiff also had diminution of movements of the fourth and the fifth toes of the left foot. He walked with a slight limp. According to Dr Dorai, the chances of improvement in the restrictions of his movements above described would be minimal though the normal life expectancy might not likely be affected. There would be severe curtailment in running, stooping, climbing a ladder and walking on uneven ground. The plaintiff, however, should be able to do sedentary jobs. The defence made no submission in this respect. For the plaintiff, Mr Ting suggested $20,000. In my view, the sum is very fair and reasonable. I award this amount under this head.

Loss of earnings

Having regard to the evidence in the instant case, I accept the broad principle in the submissions for the plaintiff that damages for loss of earnings ought to be considered on the following basis:

(a) loss of earnings based on salary; and
(b) loss of earning capacity as distinct from future loss of earnings.

However, I do not agree that the award on the actual loss of earnings should be calculated up to the date of trial because the evidence, in my opinion, does not establish on balance of probabilities that the plaintiff was totally incapacitated till the date of trial but rather, as will be explained later, till sometime before the date of trial.

The first thing I would consider is the monthly salary of the plaintifff. The plaintiff said his monthly pay was $450 whereas the defence case is that it was $400. According to the plaintiff, one Ting Lik Chung managed the defendant-company and when he (plaintiff) approached him (Ting) for a job, Ting told him that his (plaintiff's) salary would be $450 per month. The onus of proving that his monthly salary was $450 lies on the plaintiff. He did not state specifically the date he saw Ting Lik Chung. On the other hand, DW3, Ting Check Wu, said in his evidence that there were five partners in the defendant company, that almost all its affairs and business were handled by him and his father merely supervised. He said he told the plaintiff the latter's salary and it was agreed to be at $400 per month. He said he saw the plaintiff for the first time on 27 August 1982. This date, it may be noted, if itself taken into account, would be exactly 12 days before the occurrence of the accident. Another factor to consider is that originally the statement of claim did not plead the plaintiff's monthly salary to be $450. In the absence of any explanation to the contrary, it is, I think, not unreasonable to assume that the pleading had been settled according to the instructions of the plaintiff. Taking all circumstances into consideration, I would prefer and accept the evidence of DW3 in this respect and hold that the agreed salary of the plaintiff was $400 per month.

As to the commission at 20 cents per ton of logs transported, this was not pleaded nor raised in the submission. The plaintiff must be taken not to be pursuing this. In any event, there is no evidence to support the claim, eg evidence of the tonnage transported, if any.

Loss of earnings based on salary

Unquestionably, the loss of earnings should commence from 7 September 1982 (date of accident). However, on the evidence, it is difficult to accept that the loss should extend till 29 April 1986 (the date of trial of this action). On the said date, 29 April 1986, PW1, Dr Thambi Dorai, who had occasion to examine the plaintiff that same morning, testified under cross-examination that the plaintiff could do any type of sedentary job such as that of a lift attendant. In the examination-in-chief on the same day, to the question whether he attempted to get employment, the plaintiff's answer was 'No'. True, immediately before that question the plaintiff had said that he felt weak on both legs, that he could not carry heavy things and that he had not been employed after the accident but that did not necessarily mean that he was incapacitated from working. Having regard to the evidence, I am not satisfied on a balance of probabilities that he was unable to work till 29 April 1986. On the other hand, I consider it reasonable to accept that by December 1984, the plaintiff still could not work. My reasons for so saying are that on the evidence, which I accept, the plaintiff was on crutches till June 1983, thereafter he was readmitted into hospital from 8 November 1983 to 16 November 1983. After that, until December 1984, he received outpatient treatments eight times. In my opinion, the plaintiff was in a position to resume work of a sedentary nature at a point sometime between January 1985 and April 1986 despite the fact that he was treated as an outpatient on 28 November 1985 and 3 December 1985 and that on those two occasions he had complained of ulcer near his right ankle. There is a duty on the part of the plaintiff to mitigate loss, though on the evidence, it is not possible to state with any reasonable certainty as to when the plaintiff was able to engage in employment. I consider it reasonable, in fairness to both parties, to adopt the middle course and regard August 1985 as the month in which the plaintiff was capable of taking up sedentary employment of some sort. Accordingly, the loss of earnings would be from 7 September 1982 (date of accident) to, say, 6 August 1985 (35 months) at $400 per month (as found above). This gives the sum of $14,000.

Loss of earning capacity

On the evidence as adduced, I agree that this is not a case justifying the grant for the loss of future earnings. However, I am satisfied from the evidence that the plaintiff had suffered a loss of earning capacity and is entitled to an award of general damages for disability suffered: *Multar* v *Lim Kim Chet & Anor*.[11]

As the plaintiff did not secure any employment after the accident, no evidence of salary earning is available. For the plaintiff it was submitted that at best he could earn $200 per month. In the absence of any contention to the contrary from the defence, I accept the figure which to my mind is not unreasonable. The loss (ie the difference between the earning of $400 as found and the estimated earning of $200) is therefore $200. At the time of giving evidence in April 1986, the plaintiff said he was 38 years of age. In 1985, he was therefore 37 years old. According to the medical evidence, there would be no loss of life expectancy. Apart from the injuries and the disabilities

resulting therefrom, the plaintiff appeared to be in normal health. Taking the age of 55 as the retirement age and allowing 1/3 from this for contingencies of life, I would take 12 years as the years of purchase. This would yield a sum of $21,271.80. I would award a round figure of $21,500.

As stated earlier, the sum of $190, being costs of medical report and transport charges, has been agreed to and a sum of $5,670 is to be deducted from the general damages awarded.

In the result, there will be judgment for the plaintiff against the defendant in the sum of $50,020 made up as follows:

(i) Damages for pain and suffering and loss of amenities	$20,000
(ii) Loss of earnings	14,000
(iii) Loss of earning capacity	21,500
	$55,500
Add: Charges for transport and medical report	190
	$55,690
Less: Amount agreed to be deducted	5,670
	$50,020

No interest may be awarded on damages for loss of earning capacity — *Jamil bin Harun* v *Yang Kamsiah & Anor*;[12] *Joyce* v *Yeomans*;[13] *Jefford* v *Gee*;[14] *Tan Lian Heng* v *Kilang Papan Aman Sdn Bhd & Anor*.[15] There shall be interest on:

(a) $20,000 (general damages) at 8% pa from 14 May 1984 (date of service of the writ) to the date of judgment hereof;
(b) $14,190 (special damages) at 4% pa from 7 September 1982 (date of accident) to the date of judgment hereof; and
(c) interest on the judgment sum of $50,020 at 8% pa from the date of judgment hereof until payment.

I gave thought as to whether the sum of $5,670 to be deducted ought to be taken off for the purpose of awarding interest but decided not to do so since there was no agreement in this respect between the parties. Moreover, the reasons for the deduction and particulars, if any, (eg dates of advancements if applicable) were not made known to me. There shall also be an order that costs of the action be paid by the defendant to the plaintiff. In the absence of an agreement, such costs may be taxed.

Order accordingly.

Solicitors: *Yong & Wong*; *Lau & Co.*

Reported by *Mathavan Devadas*

Yew Leek Enterprise Sdn Bhd v Foong Engineering & Constructions Works Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-24-193-87
VC GEORGE J
15 MARCH 1989

Civil Procedure — Writ — Service of — Service at principal office instead of registered office — Whether service bad — Whether judgment irregular — Rules of the High Court 1980, O 62 r 4(1) — Companies Act 1965, s 350

Civil Procedure — Judgment in default of appearance — Setting aside — Inordinate delay in filing application — Defence on merit

The plaintiffs obtained judgment in default of appearance against the defendants which was perfected on 30 July 1987. The defendants were notified that the judgment had been entered but were not supplied with a copy of the judgment. On 3 September 1987, they made a search of the court file, and on 5 September 1987, applied to have the default judgment set aside. The defendants contended that the writ was not served at their registered office and the service must be set aside.

Held, dismissing the defendants' application:

(1) The period of delay in filing the application has to be assessed from the date the defendants knew or ought to have known of the default judgment having been entered. In this case, there was no inordinate delay between the defendants obtaining confirmation of judgment having been entered and the filing of the application.

(2) The defendants have not disclosed any plausible defence on merit. There was no evidence produced in support of their contention that they have a defence and counterclaim in that some of the goods supplied by the plaintiffs were defective.

(3) Order 62 r 4(1) of the Rules of the High Court 1980 provides three alternative methods of effecting service of a writ on a corporation. One is by sending a copy by registered post addressed to the corporation at the office, or if there are more than one office, at the principal office.

(4) Service of the writ can be effected at an office of a company which may not be its registered office. In this case, the writ was duly served at the only known office of the defendant company (other than its registered office), which office appears to be the principal place of business of the defendant.

Case referred to

1 *PT Pelajaran Nasional Indonesia* v *Joo Seang & Co Ltd* [1958] MLJ 113 (refd)

Legislation referred to

Companies Act 1965 s 350
Companies Ordinance 1948 s 319
Rules of the High Court 1980 O 62 r 4(1)

TY Tong for the plaintiffs.
CK Tan for the defendants.

Cur Adv Vult